Charern Properties Sdn Bhd v Choong Nam Father & Sons Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(IM)(NCvC)-1751–10 OF 2023
SEE MEE CHUN, LIM CHONG FONG JJCA AND AHMAD FAIRUZ HCJ
18 SEPTEMBER 2024

Civil Procedure — Writ of summons — Extensions of — Whether renewal of renew validity of writ must be made before the expiry of writ — O 6 r 7(2A) of the Rules of Court 2012 ('the RC') — Re-service of writ due to judgment in default being set aside — Whether renewal of writ necessary — Whether 'freezing-and-unfreezing' principle proper, cogent and just pursuant to inherent jurisdiction of court

The plaintiff commenced the writ action on 16 March 2021 and attempted to serve the writ on the defendant by way of personal service and AR registered post at its business address. Both attempts were unsuccessful. As a result, the plaintiff sought and obtained an order of substituted service from the High Court. The writ was thereafter duly served by way of substituted service and the plaintiff obtained a judgment in default against the defendant on 16 August 2021. Subsequently, the defendant managed to set aside the judgment in default on 4 January 2023. In consequence, the plaintiff could not re-serve the writ because the writ had already expired on 16 September 2021. As a result, the plaintiff on 20 January 2023 filed an application for extension of the validity of the writ ('application'). The plaintiff's application was contested by the defendant contending, amongst others, that the renewal of the validity of the writ must be made before its expiry based the amended O 6 r 7 of the Rules of Court 2012 ('the RC'). The plaintiff, in rebuttal, relied on the principle of 'freezing-and-unfreezing' principle to justify that the plaintiff was nonetheless well within time to apply for the renewal of the validity of the writ. The judicial commissioner allowed the plaintiff's application. Hence, the present appeal.

Held, dismissing the appeal with costs:

(1) Generally the application to renew the validity of the writ must be made before the expiry of the writ pursuant to O 6 r 7(2A) of the RC. On the facts of the case, there was no difficulty on the part of the plaintiff in serving the writ before the expiry of the writ. The re-service of the writ, was however, necessitated by the reason that the judgment in default obtained by the plaintiff was set aside by the defendant for irregular

service. It was clear that the writ had by then expired; hence the application had to be made (see paras 20–22).

(2) In the absence of any provision in O 6 r 7 of the RC prohibiting the same, the usage of the 'freezing-and-unfreezing' principle was proper, cogent and just pursuant to the inherent jurisdiction of the court under O 1A and O 92 r 4 of the RC. The lifespan of the writ of six months was due to expire on 15 September 2021. The judgment in default was obtained by the plaintiff on 16 August 2021. Thus, by applying the 'freezing-and-unfreezing' principle, the writ still had a lifespan of 30 days left. The judgment in default was set aside on 4 January 2023, the plaintiff hence still had 30 days to renew the validity of the writ, to wit by 3 February 2023. The plaintiff made the application to extend the validity of the writ on 20 January 2023, which was before the expiry of the writ, contrary to that contended by the defendant. Consequently, the judicial commissioner was correct to allow the plaintiff's application (see paras 25–27).

[Bahasa Malaysia summary

Plaintif memfailkan tindakan writ saman pada 16 Mac 2021 dan cuba menyerahkan writ saman kepada defendan melalui serahan kendiri dan pos berdaftar AR di alamat perniagaannya. Kedua-dua percubaan serahan tidak berjaya. Plaintif kemudiannya memperoleh perintah serahan ganti dari Mahkamah Tinggi. Writ saman itu kemudiannya diserahkan melalui serahan ganti dan plaintif memperoleh penghakiman ingkar terhadap defendan pada 16 Ogos 2021. Selepas itu, defendan berjaya mengenepikan penghakiman ingkar pada 4 Januari 2023. Akibatnya, plaintif tidak dapat menyerahkan semula writ saman tersebut kerana writ saman tersebut telah tamat tempoh pada 16 September 2021. Pada 20 Januari 2023, plaintif kemudiannya memfailkan permohonan lanjutan masa tempoh sah writ saman ('permohonan tersebut'). Permohonan plaintif telah dipertikaikan oleh defendan yang menghujahkan bahawa, antara lain, bahawa permohonan lanjutan tempoh masa writ saman haruslah dibuat sebelum tamat tempoh berdasarkan A 6 k 7 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Plaintif menghujahkan bahawa berdasarkan prinsip prinsip 'freezing-and-unfreezing', plaintif masih mempunyai masa untuk memohon lanjutan tempoh sah writ saman tersebut. Pesuruhjaya kehakiman membenarkan permohonan plaintif. Oleh itu, rayuan ini difailkan.

Diputuskan, menolak rayuan dengan kos:

(1) Secara umumnya, permohonan untuk lanjutan tempoh sah writ sama haruslah dibuat sebelum tamat tempoh writ menurut A 6 k 7(2A) KKM. Menurut fakta kes itu, tiada kesukaran di pihak plaintif untuk menyerahkan writ saman sebelum tamat tempoh. Penyerahan semula writ itu, walau bagaimanapun diperlukan atas alasan bahawa

penghakiman ingkar yang diperoleh oleh plaintif telah diketepikan oleh defendan untuk serahan yang tidak teratur. Adalah jelas bahawa writ saman itu telah tamat tempoh pada waktu itu; oleh itu permohonan itu perlu dibuat (lihat perenggan 20–22).

(2) Dengan ketiadaan sebarang peruntukan dalam A 6 k 7 KKM yang melarang perkara tersebut, penggunaan prinsip 'freezing-and-unfreezing' adalah wajar, meyakinkan dan adil menurut bidang kuasa mahkamah yang wujud di bawah A 1A dan A 92 k 4 KKM. Tempoh sah writ saman selama enam bulan itu akan tamat pada 15 September 2021. Penghakiman ingkar diperoleh oleh plaintif pada 16 Ogos 2021. Oleh itu, dengan menggunakan prinsip 'freezing-and-unfreezing, writ saman tersebut masih mempunyai jangka hayat 30 hari lagi. Penghakiman ingkar telah diketepikan pada 4 Januari 2023. Oleh itu plaintif masih mempunyai 30 hari untuk memperbaharui tempoh masa writ saman sebelum 3 Februari 2023. Plaintif membuat permohonan untuk melanjutkan tempoh sah writ saman pada 20 Januari 2023, iaitu sebelum tamat tempoh writ saman, bertentangan dengan yang dipertikaikan oleh defendan. Oleh itu, pesuruhjaya kehakiman adalah betul dengan membenarkan permohonan plaintif tersebut (lihat perenggan 25–27).]

Cases referred to

Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd [2024] 5 MLJ 856; [2024] 7 CLJ 199, CA (refd)

Choong Nam Father & Sons Construction Sdn Bhd v Charern Properties Sdn Bhd [2023] MLJU 2875, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, CA (folld)

Ever Rich Enterprise lwn Ten Mei Theng [2018] MLJU 1376; [2019] 1 MLRH 194, HC (refd)

Fimbank Plc v Owners and/or Demise Charterers of the Ship or Vessel 'Nika' now known as 'Bao Lai' [2023] 5 MLJ 192; [2022] 7 CLJ 389, CA (refd)

Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor [2024] 3 MLJ 544; [2024] 5 CLJ 519, FC (refd)

Tesco Stores (M) Sdn Bhd v Ananda Kumar a/l Krishnan [2018] 6 MLJ 261, CA (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150; [1981] CLJ 84, FC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 3 r 5, O 6 r 7, 7(2A), O 92 rr 1(4), 4

Appeal from: *Choong Nam Father & Sons Construction Sdn Bhd v Charern Properties Sdn Bhd* [2023] MLJU 2875 (High Court, Ipoh)

VS Viswanathan (with Yuvaraj Sugapathy) (Sugapathy & Partners) for the appellant.
Babu Raj Raja Gopal (Kean Chye & Sivalingam) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal in respect of an extension of the validity of the writ of summons.

[2] The appellant in this appeal and the defendant in the action is a private limited company.

[3] Likewise, the respondent in this appeal and the plaintiff in the action is a private limited company.

[4] We heard the appeal on 8 August 2024 and unanimously dismissed the same with costs of RM10,000 subject to allocator.

[5] Accordingly, we hereby provide below the grounds of our decision.

BACKGROUND

[6] The plaintiff commenced the writ action on 16 March 2021 and attempted to serve the writ on the defendant by way of personal service and AR registered post at its business address. Both attempts were unsuccessful.

[7] As the result, the plaintiff sought and obtained an order of substituted service from the High Court on 1 June 2021.

[8] The writ was thereafter duly served by way of substituted service and the plaintiff obtained a judgment in default against the defendant on 16 August 2021.

[9] Subsequently, the defendant however managed to set aside the judgment in default on 4 January 2023.

[10] In consequence, the plaintiff could not re-serve the writ because the writ had already expired on 16 September 2021.

[11] As the result, the plaintiff on 20 January 2023 filed an application for extension of the validity of the writ ('application').

IN THE HIGH COURT

[12] The plaintiff's application was contested by the defendant relying on the case of *Fimbank Plc v Owners and/or Demise Charterers of the Ship or Vessel 'Nika' now known as 'Bao Lai'* [2023] 5 MLJ 192; [2022] 7 CLJ 389 (CA) which required the renewal of the validity of the writ be made before its expiry based the amended O 6 r 7 of the Rules of Court 2012 ('the RC'). As far as the defendant is concerned, the plaintiff was at fault for having taken an inordinately long time to serve the writ on the defendant, particularly by failing to serve the writ at its new business address which was already prior notified to the plaintiff.

[13] The plaintiff, in rebuttal, relied on the principle of 'freezing-and-unfreezing' principle utilised in the case of *Ever Rich Enterprise lwn Ten Mei Theng* [2018] MLJU 1376; [2019] 1 MLRH 194 to justify that the plaintiff was nonetheless well within time to apply for the renewal of the validity of the writ.

[14] In any event, the plaintiff also resorted to O 1A, O 3 r 5 and O 92 r 1(4) of the RC that the application ought to be allowed in the interest of justice because limitation has already set in. The plaintiff would otherwise be irreversibly prejudiced.

[15] The learned judicial commissioner on 20 October 2023 in allowing the application decided as follows in his well-reasoned grounds of judgment reported in *Choong Nam Father & Sons Construction Sdn Bhd v Charern Properties Sdn Bhd* [2023] MLJU 2875:

COURT'S FINDING

Good faith of the plaintiff

[20] The plaintiff promptly initiated the legal action and subsequently attempted to serve the writ on the defendant. The timeline and attempts made shows the plaintiff's genuine intentions to serve the defendant and this suggests no deliberate delay.

[21] The plaintiff, after facing failed attempts of service through AR registered and personal means, did not resort to inaction but proactively sought the court's leave to serve by substituted service. The order for substitute service shows the court's initial acceptance of the plaintiff's reasons for substituted service.

[22] The plaintiff secured a judgment in default due to the defendant's non-response, further showing the plaintiff's proactive approach.

[23] When the court set aside the substitute service and the judgment in default, the plaintiff, rather than resorting to inaction, sought to correct the situation by extending the writ's validity. This move underscores the plaintiff's commitment to ensure that due process is complied with. The fault, if any of the plaintiff is that the plaintiff did not apply instantly to the court which set aside the default judgment and the order for substituted service.

Principle and provisions of law in support the plaintiff's position

[24] As per O 1A of the ROC 2012, the court should prioritise the overriding interest of justice over technical non-compliance. The plaintiff's application embodies this spirit. While there might be technical procedural challenges, the primary pursuit of justice mandates that the plaintiff's proactive efforts not be negated by these minor misgiving.

[25] Flexibility in time extensions: O 3 r 5 of the ROC 2012 provides the court with discretion to extend time periods, even post the expiration of the original period. This provision explicitly recognises the fact that practical scenarios might necessitate such extensions, and the plaintiff's situation is a case in point.

[26] Writ extension principles, by O 6 r 7 of the ROC 2012 states the framework for writ extensions. The plaintiff's application respects this framework and meets the conditions stipulated therein. Moreover, the plaintiff's application came within the time frame, a fact underscored by the cited case of *Ever Rich Enterprise lwn Ten Mei Theng* [2018] MLJU 1376; [2019] 1 MLRH 194, which accentuates the principle of viewing writ validity in intervals.

[27] Inherent powers of the court, O 92 r 4 ROC 2012 acknowledges the court's inherent powers to ensure justice is served and prevents the abuse of legal processes. The plaintiff's situation is an opportunity for the court to exercise this power, ensuring that justice is not overshadowed by rigid procedural technicalities.

...

CONCLUSION

[33] The plaintiff's application represents a sincere pursuit of justice, supported by their continuous proactive actions. The plaintiff cannot be faulted in any way for the 'delay' between the period when judgment in default was entered and the time it was set aside. By interpreting the Rules of Court 2012 in its true spirit, which is to ensure justice and fairness, the plaintiff's request to extend the writ's validity emerges as not only legitimate but also a necessary step in ensuring that the principles of justice are upheld. I am of opinion that both parties should be given an opportunity to ventilate the merits of each of their respective cases.

[34] For reasons stated above, I allowed plaintiff's application in encl 54 with no order as to costs.

[16] The defendant is dissatisfied with the decision of the learned judicial commissioner and has on 23 October 2023 appealed to the Court of Appeal.

A FINDINGS OF THIS COURT

[17] Before us the parties re-advanced their submissions made before the learned judicial commissioner.

B **[18]** Our function is however just that of review. We are guided by the case of this court in in *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35 (CA) where Hamid Sultan Abu Backer JCA held as follows with emphasis added by us:

C [7] ...

(a) *It is well settled that the appellate court will not ordinarily interfere with the exercise of discretion of a trial court in relation to procedural and/or interlocutory matters* (see *Gary v Garrett* (1878) Ch D 473).

D (b) *The appeal relates to an interlocutory procedural order and exercise of discretion. It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where* E *appellate interference is warranted* (see *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858*; Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2002] 3 MLJ 155).

F See also *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] CLJ 84 and *Tesco Stores (M) Sdn Bhd v Ananda Kumar a/l Krishnan* [2018] 6 MLJ 261 (CA).

[19] At this juncture, it is appropriate that we reproduce O 6 r 7 of the RC which prescribes:

G

Duration and renewal of writ (O 6, r 7)

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for six months beginning from the date of its issue, and a concurrent writ is valid in the first instance for the period of validity of the original writ which H is unexpired at the date of issue of the concurrent writ.

(2) Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would I otherwise expire, as may be specified in the order.

(2A) An application for a renewal of writ must be made before the expiry of the writ, ex-parte by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

(3) Before a writ, the validity of which has been extended under this rule, is served, it shall be marked with an official stamp in Form 3 showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served, so as to extend the validity of that other writ until the expiration of the period specified in the order.

(5) A note of the renewal shall be entered in the cause book.

[20] It is not in dispute that generally the application to renew the validity of the writ must be made before the expiry of the writ pursuant to O 6 r 7(2A) of the RC. This is on the presupposition that there is difficulty in serving the writ after reasonable attempts have been made. See *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 (FC).

[21] On the specific facts herein, there was no difficulty on the part of the plaintiff in serving the writ before the expiry of the writ. The re-service of the writ is however necessitated by reason that the judgment in default obtained by the plaintiff was set aside by the defendant for irregular service. It is clear that the writ had by then expired; hence the application has to be made.

[22] There is plainly no provision in O 6 r 7 of the RC that envisages and hence cater for this particular factual circumstance here.

[23] Nonetheless in the case of *Ever Rich Enterprise v Ten Mei Theng*, Mohamad Shariff Abu Samah JC held as follows with emphasis added by us:

[8] Berdasarkan kepada fakta tindakan kes ini, writ saman adalah bertarikh 7 Januari 2013. Tempoh tamatnya enam bulan daripada 7 Januari 2013 adalah pada 6 Julai 2013. Satu penghakiman ingkar kehadiran telah diperolehi pada 19 April 2013. Penghakiman ingkar kehadiran tersebut telah diketepikan oleh defendan pada 9 Januari 2018. Lantas permohonan pembaharuan writ saman di bawah lampiran 28 ini difailkan pada 8 Jun 2018. Justeru itu masa tidak harus dikirakan secara berterusan daripada tarikh writ saman dan Januari 2013 sehingga permohonan pembaharuan writ saman 9 Jun 2018. Dalam meneliti perkara ini, suatu penghakiman ingkar kehadiran adalah merupakan suatu pengakhiran kepada tindakan ini, di mana tempoh writ saman akan berhenti pada tarikh penghakiman ingkar kehadiran, 19 April 2013. Sekiranya penghakiman ingkar kehadiran tersebut tidak diketepikan, maka writ saman akan masih mempunyai baki masa dalam tempoh tiga bulan lagi daripada tarikh penghakiman ingkar kehadiran sehingga tarikh tamatnya tempoh asal keesahan writ saman (19 April 2013 hingga 6 Julai 2013). *Justeru itu penghakiman ingkar kehadiran tersebut telah menghidupkan semula writ saman daripada 9 Januari 2018, di mana tempoh keesahan writ saman*

tersebut bermula daripada tarikh 9 Januari 2018 dengan baki tempoh keesahan yang tertinggal. Dengan itu, writ saman akan tamat tempoh keesahannya pada atau ketika 8 April 2018.

[24] The above enunciated principle of 'freezing-and-unfreezing' as named by the parties herein has been adopted by the learned judicial commissioner based on like factual circumstances.

[25] In the absence of any provision in O 6 r 7 of the RC prohibiting the same, we are of the view that the usage of the 'freezing-and-unfreezing' principle is proper, cogent and just pursuant to the inherent jurisdiction of the court under O 1A and O 92 r 4 of the RC.

[26] On the specific facts here, the lifespan of the writ of six months is due to expire on 15 September 2021. The judgment in default is obtained by the plaintiff on 16 August 2021. Thus, by applying the 'freezing-and-unfreezing' principle, the writ still has a lifespan of 30 days left. The judgment in default was set aside on 4 January 2023, the plaintiff hence still had 30 days to renew the validity of the writ, to wit by 3 February 2023. The plaintiff made the application to extend the validity of the writ on 20 January 2023 which is before the expiry of the writ, contrary to that contended by the defendant.

[27] Consequently, we do not find that the learned judicial commissioner is plainly wrong in any way in the exercise of his discretion to allow the application based on the materials before him.

[28] We are mindful the defendant blamed the plaintiff for having self-caused the problem of irregular service which resulted in the making of the application but we are of the view that the defendant has been duly compensated in costs by the setting aside of the judgment in default. There is also no order as to costs made against the defendant notwithstanding that the plaintiff succeeded in the application.

[29] Moreover, the defendant contended that by allowing the application, the defendant is prejudiced by having lost the substantive right to the defence of limitation if the application is dismissed and necessitating the plaintiff to re-commence the action. This is, in our view, irrelevant if not also flawed because the defence of limitation is in law only a procedural right. In the Federal Court case of *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544; [2024] 5 CLJ 519, Mary Lim FCJ held as follows:

> [27] As a creature of statute, limitation under the Limitation Act is procedural as it does not affect accrued rights and interests. Limitation does not extinguish rights, it merely bars access to remedies. There is thus a need to construe the relevant

provision against the whole statute; and not just read each section unto itself, as if disparate and unrelated to the rest.

See also *Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd* [2024] 5 MLJ 856; [2024] 7 CLJ 199.

CONCLUSION

[30] It is for the foregoing reasons that we dismissed the appeal as so ordered.

Appeal dismissed.

Reported by K Selvaraju